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No. 88-545

In the Supreme Court of the United States

OCTOBER TERM, 1988

BRENDA J. HILL-DUNNING, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether, under the facts of this case, the exclusion of an expert's ultimate opinion was harmless error.

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OPINIONS BELOW

The opinion of the Court of Military Appeals (Pet. App. 1a-13a) is reported at 26 M.J. 260. The opinion of the Air Force Court of Military Review (Pet. App. 14a-17a) is unreported.

JURISDICTION

The judgment of the Court of Military Appeals was entered on August 1, 1988. The petition for a writ of certiorari was filed on September 29, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. (Supp. IV) 1259(3).

STATEMENT

Following a general court-martial at Columbus Air Force Base in Mississippi, petitioner, a member of the United States Air Force, was convicted on two counts of

signing a false official statement and on one count of larceny, in violation of Articles 107 and 121 of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. 907 and 921. She was sentenced to confinement for two years, a dishonorable discharge, total forfeiture of pay, a fine of $10,000, and a reduction in grade. The convening authority approved the findings and sentence. The Air Force Court of Military Review affirmed the findings and sentence (Pet. App. 14a-17a). The Court of Military Appeals affirmed (*id.* at 1a-13a).

1. Petitioner divorced Wilbert Bonner on January 12, 1979 (PX 3). The divorce was granted by the Chancery Court for Mississippi County, Arkansas. *Ibid.* Petitioner did not inform military officials of her divorce, however, and she continued to collect quarters and housing allowances at the "with dependent" rate (Tr. 190). As a result, during the period from February 1, 1983, until October 1, 1985, petitioner collected $9,936.77 from the government to which she was not entitled (*ibid.*; PX 12). Additionally, when applying for a loan from the Air Force Aid Society on April 17, 1984, petitioner falsely stated in official documents that she was still married to Wilbert Bonner and was providing support to him (PX 13).

In October 1985, petitioner decided to marry Steve Dunning (Tr. 267-268). To avoid disclosing her earlier divorce, she obtained a second divorce from the Chancery Court of Harrison County, Mississippi, on October 1, 1985 (PX 6). Petitioner then married Steve Dunning on October 3 (PX 11). On October 24, petitioner was questioned by a special agent of the Air Force Office of Special Investigation (OSI) concerning her marital status with Wilbert Bonner and her receipt of monies at the "with dependent" rate (Tr. 163-165). Petitioner thereafter executed documents with Air Force officials wherein she

stated that she had divorced Wilbert Bonner on October 1, 1985 (PX 9).

2. At trial, petitioner conceded that she was not married to Wilbert Bonner at the time of the charged offenses (Tr. 256). Petitioner presented a mistake of fact defense, under which she claimed that she unconsciously repressed the fact that she had divorced Wilbert Bonner in 1979 (Tr. 255, 263).

The defense called Dr. Carmen Federowich, a clinical psychiatrist, to testify about petitioner's mental condition and her repression of the fact that she was divorced. Following an extensive hearing on the admissibility of her testimony (Tr. 205-239), the trial judge allowed Dr. Federowich to testify about petitioner's mental condition, her repression and denial, and the effects of petitioner's histrionic personality disorder (Tr. 237-239). The trial judge did not allow Dr. Federowich to offer an opinion on the question whether petitioner actually knew whether she was married or divorced at the time the offenses were committed (*ibid.*).

3. The Air Force Court of Military Review found no clear abuse of discretion in the trial judge's rulings under the facts of the case and affirmed the conviction and sentence. Pet. App. 17a. The Court of Military Appeals also affirmed. *Id.* at 1a-13a. It held that the trial judge erred by not allowing the psychiatrist to express her opinion on the ultimate issue of petitioner's mental responsibility. Under the facts of the case, however, the Court of Military Appeals held that the error was harmless, because the exclusion did not prevent petitioner from fully developing a mistake of fact defense. *Id.* at 6a-8a.

ARGUMENT

Petitioner contends the Court of Military Appeals erred in ruling that the exclusion of Dr. Federowich's opinion

was harmless. That fact-bound claim does not warrant review by this Court.

Petitioner asserts (Pet. 6-7) that the trial judge's action violated her due process right to present favorable defense evidence. Petitioner did not object on that basis at trial, however, and she has therefore waived any such claim. In any event, petitioner's claim lacks merit under any harmless error standard.

The Court of Military Appeals carefully analyzed the trial court's error in accordance with Article 59(a) of the UCMJ, 10 U.S.C. 859(a), the harmless error statute applicable to the military justice system.* The court found that the trial judge's evidentiary ruling did not prevent petitioner from fully presenting her mistake of fact defense. Pet. App. 8a. In reaching that conclusion, the court relied on the fact that Dr. Federowich was a well qualified expert; that she ably provided the court-martial with information concerning petitioner's mental condition, which consisted of a histrionic personality disorder; that she explained the mechanisms of "denial" and "repression"; that she delineated not only her diagnosis but also petitioner's prior history of psychological problems; and that she was able to link petitioner's mental condition and the unconscious mechanisms of "denial" and "repression." *Id.* at 7a-8a. Additionally, the court noted that petitioner testified regarding the mistake of fact defense, and the court-martial members therefore had an opportunity to assess her credibility. Moreover, petitioner's testimony, along with the testimony provided by other defense witnesses (Tr. 303-319), allowed Dr. Federowich to link petitioner's

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* Article 59(a), 10 U.S.C. 859(a), provides as follows:

> A finding or sentence of a court-martial may not be held incorrect on the ground of an error of law unless the error materially prejudices the substantial rights of the accused.

behavior to the mistake of fact defense. The trial judge's evidentiary ruling therefore did not prevent petitioner from offering a mistake of fact defense and making use of the expert's testimony to buttress that defense. Finally, the prosecution introduced overwhelming proof of petitioner's intent, including documentary proof that petitioner had filed income tax returns from 1979 to 1984 as a single person (PX 14D-W), and the fact that the 1979 divorce decree recited that petitioner had personally appeared at the hearing (PX 3). Indeed, petitioner's own trial testimony established that she recalled meeting with her divorce attorney in 1979 and paying him (Tr. 256, 265, 270, 283).

Under these circumstances, the Court of Military Appeals correctly found that the error was harmless. Its decision is consistent with this Court's teachings that reversal is not warranted when "errors or defects that have little, if any, likelihood of having changed the result of trial." *Chapman* v. *California,* 386 U.S. 18, 22 (1967). Petitioner simply disagrees with the lower courts' resolution of that fact-bound issue. She does not allege any conflict among the circuits on this point of law, and under any standard of harmless error analysis, the error in this case did not have a material effect on the verdict. For these reasons, this case does not warrant review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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